



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Marinette County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 175111

Pursuant to petition filed June 21, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Marinette County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Thursday, August 4, 2016 at 11:45 AM at Marinette, Wisconsin.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

NOTE: The record was held open until the end of the day to allow the agency to supplement the record. It provided a list of vendor numbers for the ebtData Warehouse (Exhibit 11), a set of case comments from March and April 2016 (Exhibit 12), an access application dated February 25, 2016 (Exhibit 13), and copies of returned mail envelopes. (Exhibit 14)

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Marinette County Department of Human Services
By ██████████, Fraud Investigator
Wisconsin Job Center, Suite B
1605 University Drive
Marinette, WI 54143

Respondent:

██████████
████████████████████
████████████████████

█

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent is a resident of Marinette County.
2. On June 16, 2014, the Petitioner completed an on-line ACCESS Six Month Report Form (SMRF). The Respondent reported living in Marinette. The Respondent electronically signed the SMRF certifying under penalty of perjury that the information was correct and complete to the best of her knowledge. (Exhibit 6)
3. On October 15, 2014, the Respondent submitted a letter to a "[REDACTED]", indicating that in "May or June" she left one address in Marinette and moved to a second one temporarily, because the water was shut off in the former address. The Respondent indicated that until the end of August 2014, she intended to return to the first address, but ended up moving to various addresses in Menominee after that time. (Exhibit 4)
4. On June 30, 2016, Marinette County prepared an Administrative Disqualification Hearing alleging that the Respondent committed an intentional program violation by falsely claiming in her June 2014 Six Month Report Form that she was living in Marinette, when, in fact, she was living in Michigan. (Exhibit 10)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. ***Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional program violation was committed based on clear and convincing evidence.*** If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on August 4, 2016. Ms. Waugus indicated that the agency attempted to notify the Respondent of the date, time and location of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at two different addresses, one she provided as recently as February 2016 in an application for benefits, and a second that was provided by the post office as a forwarding address. Ms. Waugus indicated that both were returned to the agency and that the latter notice was returned as undeliverable and with no forwarding address. (Exhibits 13 and 14)

7 C.F.R. §273.16(e)(3)(i) states, "if the notice is sent using first class mail and is returned as undeliverable, the hearing may still be held." So, the hearing proceeded in the Respondent's absence.

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations “shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device).”

The Department’s written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is OIG’s burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. “more likely than not”) used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such

certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt that the elements have been shown.

The Merits of the Agency’s Case

In the case at hand, the agency asserts that the Respondent violated the rules of the FoodShare Program by lying in her June 2016 SMRF when she claimed to be living at [REDACTED].

“A household shall live in the State in which it files an application for participation” in the food stamp program. 7 *CFR* §273.3(a) “No individual may participate as a member of more than one household or in more than one project area, in any month...” Id. See also 7 *CFR* §272.4(3)

The June 2016 SMRF is reliable as a regularly kept record of the Department of Health Services and as a statement of a party opponent. It is sufficient to establish that the Respondent reported living at [REDACTED].

In order to prove the Respondent was not living at the [REDACTED] address at the time she completed her SMRF on June 16, 2014, the agency relied upon the hearsay statement of a [REDACTED] contained in an e-mail. (Exhibit 5) There is nothing about the hearsay, nor the circumstances in which the statements were made that lend an indicia of reliability to the hearsay.

The agency also relied upon the double hearsay statement of an [REDACTED] to the Office of Inspector General (Exhibit 2) Again, there is nothing about the statement, nor the circumstances in which it was made that lends the hearsay statement an indicia of reliability.

In the absence of live testimony from [REDACTED] or [REDACTED], their statements cannot be deemed reliable.

The agency argued that the Respondent had to have been living in Menominee, because her EBT usage was largely in Menominee, Michigan. (See Exhibits 7 and 11) While the Respondent did do a considerable amount of grocery shopping in Menominee, it does not appear to have been her exclusive location for shopping. Further, this isn't the typical case of out of state usage being a red flag. More typically, a flag is raised when a person reports being a Wisconsin resident while exclusively doing their shopping in some far away location like Arizona, but in this case, Menominee, MI borders Marinette, WI¹. This writer has had occasion to stay in Marinette while traveling for work, and while there, I drove over a small bridge to a restaurant in Menominee for dinner. As such, in this case, it is difficult to draw the conclusion that the Respondent was not living in Marinette, just because she shopped in Menominee.

The agency's best evidence is the letter from the Respondent, dated October 15, 2014, in which she indicates she changed residences in "May or June" because the water was shut off. (Exhibit 4) However, the Respondent indicated that the change was intended to be temporary and that she expected to return to the former address. The agency has provided no reliable evidence to rebut the Respondent's claim. As such, there is insufficient evidence to prove the [REDACTED] address was not the Respondent's permanent residence at the time she completed her June 2014 SMRF.

Even if it could be found that the Respondent provided misleading information in her SMRF, the record does not support a finding that the Respondent acted with the intention of breaking the rules of the program.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. However, intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977),

Here, the Respondent indicated that at the time she completed her SMRF, she intended her change in residence to be temporary. As such, it is unclear whether she was intentionally breaking the rules. Further, the agency has not provided any documentation showing that the Petitioner was told what the rules were and the disqualification penalties for breaking the rules. Per 7 CFR 273.16(d), "...The State agency shall inform the household in writing of the disqualification penalties for intentional program violation each time it applies for program benefits. The penalties shall be in clear, prominent and bold face lettering on the application form."

CONCLUSIONS OF LAW

Marinette County has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program.

NOW, THEREFORE, it is ORDERED

That IPV case [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

¹ <https://www.google.com/maps/place/Marinette,+WI+54143/@45.0901951,-87.658766,13z/data=!4m5!3m4!1s0x4d52a8d53b76bbe5:0x49884830b223e627!8m2!3d45.0999849!4d-87.6306623>

APPEAL TO COURT

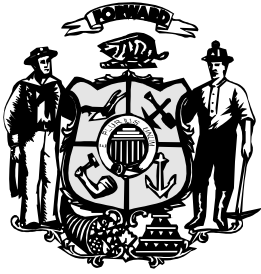
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 26th day of August, 2016

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Bay Lake Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on August 26, 2016.

Marinette County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@marinettecounty.com